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Arizona Corporation Commission

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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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IN THE MATTER OF THE NOTICE OF
PROPOSED RULEMAKING REGARDING THE
TRANSPORTATION OF NATURAL GAS, OTHER
GASES AND HAZARDOUS LIQUIDS BY PIPELINES

Docket No. RG-00000A-04-0169

**SOUTHWEST GAS CORPORATION'S
OPPOSITION TO UNISOURCE GAS, INC.'S COMMENTS AND
REPLY TO STAFF'S RESPONSIVE COMMENTS**

Southwest Gas Corporation ("Southwest") respectfully submits comments in opposition to the comments of Unisource Gas, Inc. (UNS Gas) of August 2, 2004 and in reply to the Staff's Response ("Response") of August 16, 2004 regarding proposed A.A.C. R14-5-202(S) (the "proposed rule") in the above captioned matter.

Southwest continues to support the Commission's effort to formalize the procedure involving laboratory testing of materials involved in significant incidents. UNS Gas has proposed amendments to the definition of the failures that trigger an operator's duty to notify the OPS and to retain evidence. Southwest believes that the UNS Gas amendments, if adopted, will engender confusion and may not even result in operators reporting or retaining evidence in the aftermath of significant incidents. The better approach is to amend the proposed rule by incorporating a reference to the operator's duty to provide written notification to the OPS as currently required by A.A.C. R14-5-203.

Further, Southwest remains concerned that the proposed rule as urged by the Response will expose the Commission to unintended liabilities, will add unintended complexities into future Commission proceedings, and may frustrate the Commission's future efforts to enforce compliance with pipeline safety regulations. Accordingly, Southwest continues to urge the adoption of the amendments it has filed because Southwest believes that the amendments will meet the Commission's goals while simultaneously minimizing the Commission's exposure to civil liability, minimizing the likelihood that future Commission proceedings will be encumbered by complex legal rulings, and minimizing the likelihood that the Commission's future efforts to enforce operator compliance will be frustrated.

1 **A. The Proposed Amendments By UNS Gas May Yield Unintended Results And Make the**
2 **Rule Vague And Ambiguous.**

3 The amendments to the proposed rule offered by UNS Gas and supported by the Response
4 would not require an operator to retain evidence or report the removal of the material from a pipeline
5 failure caused by an observable manufacturing defect. This is true regardless of the magnitude of the
6 release and resulting damage. In contrast, under Southwest's proposed amendment,¹ the operator's
7 notification and evidence retention duties would accrue at a threshold already determined by this
8 Commission to be significant.

9 The revision offered by UNS Gas is entirely grounded upon an operator's subjective
10 interpretation of the cause of a failure. This will likely result in confusion and interpretative disputes
11 between the operator and the OPS. Southwest urges a different approach that is grounded in an
12 objective understanding of the result of a given incident. Specifically, Southwest proposes to define the
13 operator's reporting and evidence retention duties by including a reference to the pre-existing written
14 reporting requirements of A.A.C. R14-5-203.² Southwest's amendment is founded upon existing law
15

16 ¹ Southwest's proposed amendment provides, in pertinent part:

- 17 1. If an operator of an intrastate natural gas, other gas or hazardous liquid pipeline removes
18 a portion of a pipeline that failed for any reason other than observable external corrosion
19 or third-party damage **and results in an incident that meets the written reporting**
20 **requirements of R14-5-203, then** the operator shall retain the portion that was removed
21 and shall **telephonically** notify the Office of Pipeline Safety of the removal within two
22 hours after the removal is completed. A notice made pursuant to this subsection shall
23 include all of the following:
- 24 a. Identity of the failed pipeline.
 - 25 b. ~~[L]~~**Description and** location of the failure.
 - 26 c. Date and time of the removal.
 - 27 d. Length **or quantity** of the removed portion.
 - 28 e. Storage location of the removed portion.
 - f. The operator's opinion regarding the probable cause or causes of the failure.
 - g. **The operator's plan for examination of the removed portion.**
 - h.** Any additional information about the failure or the removal of the portion of the
 pipeline that failed that is requested by the Office of Pipeline Safety.

The Office of Pipeline Safety shall confirm its notification in writing.

25 ² A.A.C. R14-5-203, Pipeline Incident Reports and Investigations, provides in pertinent part:

26 C. Require written incident report:

27 1. Operators of an intrastate pipeline transporting natural gas, LNG or other gases will
28 file a written incident report when an incident occurs involving a natural gas or other gas pipeline
that results in any of the following:

- a. An explosion or fire not intentionally set by the operator.
- b. Injury to a person that results in 1 or more of the following:
 - i. Death.
 - ii. Loss of consciousness.
 - iii. Need for medical treatment requiring hospitalization.
- c. Property damage, including the value of the lost gas, estimated in excess of \$5,000.

1 and is understood by operators and pipeline safety inspectors.

2 In contrast, the amendment offered by UNS Gas triggers an operator's reporting and retention
3 duties upon the removal of any portion of a pipeline "that failed for any reason *other than* observable
4 corrosion or [sic] third party damage, improper installation, poor workmanship, and manufacturing
5 defect." (Emphasis added). An operator could reasonably contend that no significant leak fits this
6 definition notwithstanding the rule of statutory construction against rendering a regulation meaningless³
7 and against construing a rule to provide an absurd result.⁴ The rule offered by UNS Gas is unduly vague
8 and ambiguous. For example, what is the difference between "improper installation" and "poor
9 workmanship"? What is an "observable ... manufacturing defect"? Southwest has engaged in extensive
10 litigation over this very topic. Indeed, most of the terms offered in the UNS Gas amendments are not
11 used in the DOT's newly revised Incident Report for Gas Distribution System (form RSPA F 7100.1)⁵

12 d. Emergency transmission pipeline shutdown.

13 e. Overpressure of a pipeline system where a pipeline operating at less than 12 PSIG
14 exceeds MAOP by 50%, where a pipeline operating between 12 PSIG and 60 PSIG exceeds
MAOP by 6 PSIG or where a pipeline operating over 60 PSIG exceeds MAOP plus 10%.

15 f. Emergency shutdown of a LNG process or storage facility.

16 3. Operators of an intrastate pipeline transporting hazardous liquid will make a written
17 incident report on DOT Form 7000-1, incorporated by reference and on file with the Office of the
Secretary of State, and copies available from the Commission Office of Pipeline Safety, 1200
West Washington, Phoenix Arizona 85007, when there is a release of hazardous liquid which
results in any of the following:

18 a. An explosion or fire not intentionally set by the operator.

19 b. Injury to a person that results in 1 or more of the following:

i. Death.

ii. Loss of consciousness.

iii. Inability to leave the scene of the incident unassisted.

iv. Need for medical treatment.

20 v. Disability which interferes with a person's normal daily activities beyond the
21 date of the incident.

c. The loss of 50 or more barrels of hazardous liquid or carbon dioxide.

22 d. The escape of more than five barrels a day of highly volatile liquids into the
atmosphere.

23 e. Property damage estimated in excess of \$5,000.

f. News media inquiry.

24 ³ "In interpreting statutes, courts are under a duty to give statutes operation and effect and should avoid a
25 construction that leaves the statute meaningless or of no effect." St. Joseph's Hospital and Medical Center v.
Maricopa County, 130 Ariz. 239, 248, 635 P.2d 527, 536 (Ariz.App., 1981).

26 ⁴ "If the language is clear, the court must 'apply it without resorting to other methods of statutory interpretation,'
27 unless application of the plain meaning would lead to impossible or absurd results." Bilke v. State, 206 Ariz. 462,
464, ¶ 11, 80 P.3d 269, 271 (2003) (quoting Hayes v. Cont'l Ins. Co., 178 Ariz. 264, 268, 872 P.2d 668, 672
(1994)).

28 ⁵ This form is available at [http://ops.dot.gov/forms/Gas%20D%20Incident%20Form\(7100_1\).pdf](http://ops.dot.gov/forms/Gas%20D%20Incident%20Form(7100_1).pdf), and related
instructions are available at [http://ops.dot.gov/forms/Gas%20D%20Incident%20Instructions\(7100_1\).pdf](http://ops.dot.gov/forms/Gas%20D%20Incident%20Instructions(7100_1).pdf).

1 or in the Incident Report for Gas Transmission and Gathering Systems (form RSPA F 7100.2) and their
2 associated instructions.⁶ They are not defined in the proposed regulation itself.

3 An argument could be made that the rule is facially invalid for vagueness. A statute is
4 unconstitutionally vague when "it does not give persons of ordinary intelligence a reasonable
5 opportunity to learn what it prohibits and does not provide explicit standards for those who will apply
6 it." State v. Takacs, 169 Ariz. 392, 394, 819 P.2d 978, 980 (App.1991).

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8 In analyzing a vagueness challenge, courts will look to judicial
9 decisions, to settled common law meanings of the words used, and to the
10 technical meanings of those words. See, e.g., Village of Hoffman Estates
11 v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499-501, 102 S.Ct. 1186,
12 71 L.Ed.2d 362 (1982). Judicial gloss can supply meaning to a statute that
otherwise lacks it. United States v. Lanier, 520 U.S. 259, 266, 177 S.Ct.
1219, 137 L.Ed.2d 432 (1997). The key is whether the statutes, either
standing alone or as construed, made it reasonably clear at the relevant
time that a party's conduct was prohibited. See id. at 267, 117 S.Ct. 1219.

13 SAL Leasing, Inc. v. State of Arizona, ex rel. Janet Napolitano, 198 Ariz. 434, 442, 10 P.3d 1221, 1229
14 (2000). Applying the above quoted rules, the UNS Gas amendments appear to fail constitutional
15 scrutiny.

16 The amendment offered by UNS Gas and supported by Commission Staff contains no
17 justification in the written record. The better approach is contained in the amendments urged by
18 Southwest in its previously filed comments.

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20 **B. The Proposed Rule Will Expose The Commission to Unintended Liabilities.**

21 While the Response correctly observes that the OPS is not an "operator" as that term is defined
22 by regulation, one need not transport natural gas between two points to assume the liability of an
23 operator. For example, a certificated operator is liable for injury proximately caused by the negligent
24 construction and maintenance of its facilities, yet when the operator subcontracts out those functions,
25 then its subcontractor assumes liability as an operator for those functions. Southwest believes the
26 authorities it referenced in its earlier Comments establish that the act of dictating the means and methods
27

28 ⁶ Of the three terms offered by UNS Gas, only "poor workmanship" is used in the Incident Report forms, but the term is not defined in the instructions for those forms.

1 of a material investigation is an operation and maintenance function.

2 By and through the proposed rule, the Commission will convert the OPS's role from that of an
3 enforcement agency that polices an operator's compliance with pipeline safety regulations into that of an
4 operator that will be held accountable through applicable tort laws. The proposed rule establishes that
5 the OPS will choose the laboratory and "approve" of the number and type of tests to be performed.
6 These new powers directly conflict with 49 C.F.R. § 192.617, which provides that "The **operator** shall
7 establish procedures for analyzing accidents and failures ..." These provisions cannot be reconciled:
8 either the certificated operator will analyze accidents and failures by choosing an independent (and
9 subcontracted) laboratory and having the final word on the testing methodology or the OPS will. If the
10 OPS performs those functions it prevents the operator from complying with 49 C.F.R. § 192.617.

11 The Response argues that the risks associated with such activities are non-existent and therefore
12 the Commission should adopt the proposed rule without amendment. In today's litigious environment,
13 Southwest believes it is reasonable to expect the OPS to be a defendant in any litigation following a
14 significant incident in which it can be alleged that OPS bears some responsibility. Indeed, the
15 Commission is a defendant in a personal injury lawsuit at the present time from an incident involving
16 the release and ignition of natural gas.⁷

17 The Response evidences a difficulty envisioning what set of facts could ever exist that could
18 impose liability upon the OPS if the proposed rule is adopted. Consider this scenario: A failed natural
19 gas pipe in Incident A is photographed and sent to the OPS's chosen independent laboratory and is
20 negligently lost by the laboratory before analysis. Two years later, another pipe fails in Incident B
21 causing significant damage to persons and property. Photographs of the pipe from Incident A and
22 Incident B are compared and they show nearly identical failure mechanisms. The pipe from incident B
23 is analyzed by a laboratory and the cause of failure is determined. At trial, the jury determines from a
24 review of the operator's maintenance records and operating practices that a similar failure had not
25 occurred prior to Incident A and if the pipe from Incident A had not been lost, the lessons learned from
26 Incident A would have resulted in the operator pursuing a remediation program that would have

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28 ⁷ The operative paragraph in the current version of the Plaintiffs' Complaint provides that the Commission and the other defendants, "**maintained, operated, owned, excavated, inspected, installed sleeved and/or supervised the excavation, maintenance, inspection, operation, sleeving and/or installation of the natural gas pipeline located near or under the mobile home space rented to Plaintiffs.**" (Emphasis added).

1 prevented Incident B. Result: the OPS obtains 100% liability due to the loss of the failed part from
2 Incident A with a *substantial* monetary verdict.⁸

3 Rather than the mere negligent misplacement of a specimen by the OPS's chosen independent
4 laboratory, other possibilities exist: an analysis by a laboratory retained by the OPS and relied upon by
5 the certificated operator proves faulty, either through a simple misinterpretation of the test data by the
6 laboratory personnel, or by the negligent maintenance of their testing apparatus, or because the
7 laboratory obtained the assignment by misrepresenting their credentials to the OPS.

8 The Response contends that the court decisions relied upon by Southwest in its Comments are
9 not persuasive because the judges in those decisions were not asked to determine and therefore did not
10 decide whether a defendant was actually liable. Instead, those decisions established that a lawsuit
11 should not be dismissed against the defendant as a matter of law and that the jury would decide whether
12 liability would attach and if so, the jury would determine the amount. What level of comfort should the
13 OPS have if a trial court judge denies the OPS's attempt to extract itself as a matter of law from a multi-
14 million dollar lawsuit?

15 The strictures of A.R.S. § 41-1030 obligate the Commission to promulgate regulations in
16 substantial compliance with Article 5 of the Administrative Procedure chapter of Title 41 of the Arizona
17 Revised Statutes,⁹ which includes the requirement in A.R.S. § 41-1055 that proposed rules be
18 accompanied by an economic impact statement that includes an identification of who will bear the cost
19 of the regulation, a cost benefit analysis, and statement of the probable effect on state revenues. The
20 impact statement prepared in support of the proposed rule does not accurately reflect the potential costs
21 that would accrue if the proposed rule is implemented, and therefore the proposed rule should not be
22 adopted in its current form without a substantially revised economic impact statement. In contrast, the
23 amendments offered by Southwest would not require a substantially revised economic impact statement.

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26 ⁸ It should be noted that Incident B could occur beyond the borders of Arizona if the certificated operator
27 operates a pipeline system beyond Arizona, and therefore the lawsuit and verdict would obtain from a court
beyond the borders of Arizona. Southwest operates pipeline systems in Arizona, Nevada, and California.

28 ⁹ While A.R.S. § 41-1057(2) specifically exempts the Commission from the application of article 5, that same
statute provides that the Commission "shall adopt substantially similar review procedures, including the
preparation of an economic impact statement and a statement of the effect of the rule on small business."

1 **C. Existing Statutes Prevent The Commission From Adopting A Rule That Empowers The**
2 **OPS To Select Laboratories And Approve An Operator's Testing Methodologies.**

3 That part of the proposed rule that allows the OPS to select the independent laboratory and have
4 the final word on the materials testing methodology is facially invalid because the Commission lacks the
5 rulemaking authority to adopt a rule that vests the OPS with these operational and maintenance
6 functions. Specifically, A.R.S. § 41-1030(C) provides that an "agency shall not make a rule under a
7 specific grant of rule making authority that *exceeds the subject matter areas listed in the specific statute*
8 *authorizing the rule* [or] make a rule under a general grant of rule making authority to supplement a
9 more specific grant of rule making authority." The Commission's rule making power in this regard
10 arises from A.R.S. § 40-441,¹⁰ which vests the Commission with the authority to "prescribe and adopt
11 ... safety standards," yet the selection of a laboratory and the approval of a testing methodology is not
12 included in that authority.

13 This same statute also vests the Commission with the authority to "take necessary action in
14 accordance with section 5(a) of the federal natural gas pipeline safety act of 1968, as amended..."
15 Section 5(a) is included in Attachment 1 and was originally identified as 49 App. U.S.C. § 1674(a), but
16 that statute has been repealed. Subsequent Congressional enactments appear to position the
17 requirements of this former Section into 49 U.S.C. § 60105. However, neither the original section 5(a)
18 of the 1968 act nor the current provisions of 49 U.S.C. § 60105 grant the Commission the plenary
19 authority to supplant a certificated operator's maintenance and operational functions.
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21
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23 ¹⁰ A.R.S. § 40-441, Commission safety regulations, rules and orders; definitions, provides:

24 A. For the purpose of providing state control over safety standards and practices applicable to the
25 transportation of gas and hazardous liquids and gas and hazardous liquids pipeline facilities
26 within the state to the full extent permissible under the federal natural gas pipeline safety act of
27 1968, as amended, and the hazardous liquid pipeline safety act of 1979, as amended, the
commission shall be vested with the authority to prescribe and adopt by regulation, rule or order
appropriate safety standards for all such transportation of gas and hazardous liquids and gas and
hazardous liquids pipeline facilities, including both privately owned and public, which are not
subject to exclusive federal control. Upon the adoption of such regulations, rules or orders, the
commission shall from time to time make certifications and reports and take any other necessary
action in accordance with section 5(a) of the federal natural gas pipeline safety act of 1968, as
amended, and § 205(a) of the federal hazardous liquid pipeline safety act of 1979, as amended.

28 B. All terms used in this article which are defined in the federal natural gas pipeline safety act of
1968, as amended, and the hazardous liquid pipeline safety act of 1979, as amended, shall have
the definitions set forth in such act.

Southwest is thus unaware of any constitutional authority or legislatively delegated authority that grants the Commission the power to adopt the proposed rule. In contrast, the amendments offered by Southwest are likely within the Commission's rulemaking authority.

D. The Proposed Rule Infringes Due Process And May Hinder the Commission's Ability To Enforce An Operator's Compliance With Pipeline Safety Standards.

Due Process *is* infringed when an investigating and prosecuting authority unilaterally resolves discovery disputes in its own favor, and none of the authority cited in the Response refutes this proposition. The United States Supreme Court has set forth standards for evaluating a tribunal's fairness under the Due Process Clause. "[A] 'fair trial in a fair tribunal is a basic requirement of due process.' This applies to administrative agencies which adjudicate as well as to courts." Withrow v. Larkin, 421 U.S. 35, 46 (1975) (quoting In re Murchison, 349 U.S. 133, 136 (1955)). Allowing the OPS to adjudicate its own disputes with an operator over testing methodologies and without regard to the Commission's Rules of Practice and Procedure is not a "fair trial in a fair tribunal." Allowing the Staff to use the fruits of such a test in an enforcement action against an operator will not yield a "fair trial in a fair tribunal."

Notably, if the federal Administrative Procedure Act applied (as it likely would if the federal OPS were the actor in an enforcement proceeding instead of the state OPS), the Commission would be prevented from promulgating such a regulation inasmuch as it would conflict with the requirements of 5 U.S.C. § 554(d).¹¹ This statute prevents an agency adjudicator from performing the agency's

¹¹ 5 U.S.C. § 554, Adjudication, provides in relevant part with added emphases,

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, **such an employee may not—**

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) **be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.**

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

1 investigative or prosecuting functions in the same enforcement action.

2 Elsewhere in the Response is a citation to the distant United States Court of Appeals for the
3 Fourth Circuit in support of that portion of the Response that discusses the consequences of evidence
4 spoliation in civil penalty enforcement proceedings. To be sure, Arizona courts offer little specific
5 guidance on which sanction is appropriate when spoliation occurs in civil proceedings. However, many
6 other jurisdictions outside the Fourth Circuit have determined that spoliation can occur in the absence of
7 intentional conduct by the spoliator, and that evidence *suppression* is an appropriate remedy in civil
8 proceedings even when evidence is *negligently* lost. See Koesel et al, Spoliation of Evidence, Sanctions
9 and Remedies for Destruction of Evidence in Civil Litigation, 35-47 (published by American Bar
10 Association, Tort and Insurance Practice Section, 2000). Regardless, if the OPS unilaterally overrides
11 an operator's objection to a test and that, in turn, results in the destruction of evidence, then the operator
12 would be protesting the fruits of the OPS's *intentional conduct*.¹² In that event, the appropriate remedy
13 should be the most drastic on the continuum of available remedies, which is *dismissal of the civil*
14 *enforcement action*, not the mere imposition of an adverse inference as advocated by the Response.

15 The Response invokes Werner v. Prins, 168 Ariz. 271, 812 P.2d 1089 (App. Div. 1991) for the
16 proposition that in certain civil proceedings, the state's failure to preserve a sample so the adverse party
17 can conduct its own testing is not a due process violation and that the state's laboratory results may be
18 admitted. This reliance upon Werner is misplaced. In Werner, the state was unable to provide Werner
19 with a reasonably reliable preserved breath sample for use in a DUI civil driver's license suspension
20 hearing, even though Werner had made an adequate and timely request for the sample. Importantly, the
21 state conducted a blood alcohol test on its own sample. Those test results revealed an unlawfully high
22 concentration of blood alcohol, and at the hearing the state undisputedly complied with A.R.S. § 28-
23 692.03, which defined the civil foundational requirements for admitting the results of a breath test at a
24 license suspension hearing. The Werner court found no due process violation in that instance because,
25 "the statutory scheme provides adequate safeguards to ensure that the test result is valid by requiring
26 that the testing machine be in proper working order, functioning within allowable tolerances and

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28 ¹² In *State v. Youngblood*, 173 Ariz. 502, the Court held that evidence suppression in a criminal case was
compelled by the due process clause in the absence of a "bad faith" failure to preserve evidence. In doing so, the
court terms "bad faith" as "a conscious, **intentional** or malicious failure to preserve evidence." *Id.* at 506
(emphasis added).

1 *adequately tested.” Id.*, 168 Ariz. at 275, 812 P.2d at 1093 (emphasis added). This makes sense: there
2 is only one specific type of test employed in a DUI license revocation hearing (blood alcohol content)
3 and the state presented evidence that it performed the test in such a way as to ensure the test results were
4 reliable by following a method specifically condoned by the highly reticulated procedures defined by the
5 Legislature in A.R.S. § 28-692.03 (subsequently repealed), which is included as Attachment 2. In
6 contrast, the proposed rule offers no safeguards whatsoever for the testing of material samples ordered
7 by the OPS over the objection of an operator. In fact, given the near infinite combination of possible
8 failure mechanisms of pipeline components, it is probably impossible to reform the proposed rule to
9 account for all the different testing methodologies in order for the rule to provide the safeguards
10 necessary to survive the due process scrutiny of Werner. Thus, Werner supports Southwest’s contention
11 that due process will be violated if OPS unilaterally resolves discovery disputes over the disposition of
12 physical evidence.

13
14 **E. The Proposed Rule Would Unlawfully Shift The Cost Of Laboratory Analysis Onto An**
15 **Operator.**

16 Southwest disagrees with that portion of the Response that discusses the cost-shifting component
17 of the proposed rule. The Response relies upon a federal licensing regime under the National
18 Environmental Policy Act for the proposition that the government can make a license applicant pay for
19 an analysis by a government’s selected laboratory. This argument is made without citation to any
20 statute, regulation, decision, or other authority. Regardless, a licensing application is in no way
21 comparable to an enforcement action where civil penalties are sought. The Commission’s own earlier
22 invocation of the NTSB’s and RSPA’s activities were appropriate in that these agencies operate in a
23 comparable regulatory regime which the State of Arizona should consult when engaged in rulemaking.
24 Southwest has demonstrated that the proposed rule substantially deviates from the federal regulatory
25 regime, and the Response is silent on this point.

26 Importantly, Southwest asserted that it was unaware of any authority in support of the
27 Commission’s rulemaking power to impose the laboratory costs onto an operator. In fact, A.R.S. § 41-
28 1008(B) requires the Commission to identify in its notice of rulemaking the authority in support of the

1 cost-shifting component of the proposed rule, yet no competent authority was offered. Further, A.R.S.
2 § 41-1008(A)(1) provides that "an agency shall not ... charge or receive a fee or make a rule
3 establishing a fee unless the fee for the specific activity is expressly authorized by statute [or] make a
4 rule establishing a fee that is solely based on a statute that generally authorizes an agency to recover its
5 costs...." Similarly, A.R.S. § 41-1030(C) provides that an "agency shall not make a rule under a
6 specific grant of rule making authority that exceeds the subject matter areas listed in the specific statute
7 authorizing the rule [or] make a rule under a general grant of rule making authority to supplement a
8 more specific grant of rule making authority."

9 While the Response invokes A.R.S. § 40-441 as authority for the Commission's power to impose
10 the laboratory costs onto the operator, that statute neither expressly or generally authorizes the
11 Commission the authority to establish this – or any – fee shifting. Instead, as noted earlier in this Reply,
12 A.R.S. § 40-441 vests the Commission with the authority to "prescribe and adopt ... safety standards"
13 and to "take necessary action in accordance with section 5(a) of the federal natural gas pipeline safety
14 act of 1968, as amended..." No part of this statute, no part of the original section 5(a) of the 1968 act,
15 and no part of the current provisions of 49 U.S.C. § 60105 grant the Commission the plenary authority
16 to impose fees on operators. Southwest remains unaware of any authority upon which the Commission
17 can promulgate the proposed cost-shifting rule.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing **REPLY COMMENTS OF SOUTHWEST GAS CORPORATION** by mailing a copy, properly addressed, with postage prepaid, to each of the following individuals:

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8 Phoenix, AZ 85004-1103

9 Dated at this 30th day of August, 2004.

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11 An employee of
12 SOUTHWEST GAS CORPORATION
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Attachment 1

Public Law 90-481

August 12, 1968
[S. 1156]

AN ACT

To authorize the Secretary of Transportation to prescribe safety standards for the transportation of natural and other gas by pipeline, and for other purposes.

Natural Gas
Pipeline Safety
Act of 1968.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Natural Gas Pipeline Safety Act of 1968".

DEFINITIONS

SEC. 2. As used in this Act—

(1) "Person" means any individual, firm, joint venture, partnership, corporation, association, State, municipality, cooperative association, or joint stock association, and includes any trustee, receiver, assignee, or personal representative thereof;

(2) "Gas" means natural gas, flammable gas, or gas which is toxic or corrosive;

(3) "Transportation of gas" means the gathering, transmission or distribution of gas by pipeline or its storage in or affecting interstate or foreign commerce; except that it shall not include the gathering of gas in those rural locations which lie outside the limits of any incorporated or unincorporated city, town, village, or any other designated residential or commercial area such as a subdivision, a business or shopping center, a community development, or any similar populated area which the Secretary may define as a nonrural area;

(4) "Pipeline facilities" includes, without limitation, new and existing pipe rights-of-way and any equipment facility, or building used in the transportation of gas or the treatment of gas during the course of transportation but "rights-of-way" as used in this Act does not authorize the Secretary to prescribe the location or routing of any pipeline facility;

(5) "State" includes each of the several States, the District of Columbia, and the Commonwealth of Puerto Rico;

(6) "Municipality" means a city, county, or any other political subdivision of a State;

(7) "National organization of State commissions" means the national organization of the State commissions referred to in part II of the Interstate Commerce Act;

(8) "Interstate transmission facilities" means pipeline facilities used in the transportation of gas which are subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act; and

(9) "Secretary" means the Secretary of Transportation.

STANDARDS ESTABLISHED

SEC. 3. (a) As soon as practicable but not later than three months after the enactment of this Act, the Secretary shall, by order, adopt as interim minimum Federal safety standards for pipeline facilities and the transportation of gas in each State the State standards regulating pipeline facilities and the transportation of gas within such State on the date of enactment of this Act. In any State in which no such standards are in effect, the Secretary shall, by order, establish interim Federal safety standards for pipeline facilities and the transportation of gas in such State which shall be such standards as are common to a majority of States having safety standards for the transportation of gas and pipeline facilities on such date. Interim standards shall remain in effect until amended or revoked pursuant to this section. Any State agency may adopt such additional or more stringent

49 Stat. 543;
54 Stat. 919.
49 USC 301.

52 Stat. 821.
15 USC 717w.

standards for pipeline facilities and the transportation of gas not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act as are not incompatible with the Federal minimum standards, but may not adopt or continue in force after the interim standards provided for above become effective any such standards applicable to interstate transmission facilities.

52 Stat. 821.
15 USC 717w.

(b) Not later than twenty-four months after the enactment of this Act, and from time to time thereafter, the Secretary shall, by order, establish minimum Federal safety standards for the transportation of gas and pipeline facilities. Such standards may apply to the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities. Standards affecting the design, installation, construction, initial inspection, and initial testing shall not be applicable to pipeline facilities in existence on the date such standards are adopted. Whenever the Secretary shall find a particular facility to be hazardous to life or property, he shall be empowered to require the person operating such facility to take such steps necessary to remove such hazards. Such Federal safety standards shall be practicable and designed to meet the need for pipeline safety. In prescribing such standards, the Secretary shall consider—

Federal safety standards.

- (1) relevant available pipeline safety data;
- (2) whether such standards are appropriate for the particular type of pipeline transportation;
- (3) the reasonableness of any proposed standards; and
- (4) the extent to which such standards will contribute to public safety.

Consideration factors.

Any State agency may adopt such additional or more stringent standards for pipeline facilities and the transportation of gas not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act as are not incompatible with the Federal minimum standards, but may not adopt or continue in force after the minimum Federal safety standards referred to in this subsection become effective any such standards applicable to interstate transmission facilities.

(c) Any standards prescribed under this section, and amendments thereto, shall become effective thirty days after the date of issuance of such standards unless the Secretary, for good cause recited, determines an earlier or later effective date is required as a result of the period reasonably necessary for compliance.

Effective date.

(d) The provisions of subchapter II of chapter 5 of title 5 of the United States Code shall apply to all orders establishing, amending, revoking, or waiving compliance with, any standard established under this Act. The Secretary shall afford interested persons an opportunity to participate fully in the establishment of such safety standards through submission of written data, views, or arguments with opportunity to present oral testimony and argument.

50 Stat. 381.
5 USC 551-559.

(e) Upon application by any person engaged in the transportation of gas or the operation of pipeline facilities, the Secretary may, after notice and opportunity for hearing and under such terms and conditions and to such extent as he deems appropriate, waive in whole or in part compliance with any standard established under this Act, if he determines that a waiver of compliance with such standard is not inconsistent with gas pipeline safety. The Secretary shall state his reasons for any such waiver. A State agency, with respect to which there is in effect a certification pursuant to section 5(a) or an agreement pursuant to section 5(b), may waive compliance with a safety standard in the same manner as the Secretary, provided such State agency gives the Secretary written notice at least sixty days prior to the effective date of the waiver. If, before the effective date of a waiver to be granted by a State agency, the Secretary objects in writing to the

Standards, waiver of compliance.

Notice to State
agency; oppor-
tunity for hearing.

granting of the waiver, any State agency action granting the waiver will be stayed. After notifying such State agency of his objection, the Secretary shall afford such agency a prompt opportunity to present its request for waiver, with opportunity for hearing, and the Secretary shall determine finally whether the requested waiver may be granted.

TECHNICAL PIPELINE SAFETY STANDARDS COMMITTEE

SEC. 4. (a) The Secretary shall establish a Technical Pipeline Safety Standards Committee. The Committee shall be appointed by the Secretary, after consultation with public and private agencies concerned with the technical aspect of the transportation of gas or the operation of pipeline facilities, and shall be composed of fifteen members each of whom shall be experienced in the safety regulation of the transportation of gas and of pipeline facilities or technically qualified by training and experience in one or more fields of engineering applied in the transportation of gas or the operation of pipeline facilities to evaluate gas pipeline safety standards, as follows:

Membership.

(1) Five members shall be selected from governmental agencies, including State and Federal Governments, two of whom, after consultation with representatives of the national organization of State commissions, shall be State commissioners;

(2) Four members shall be selected from the natural gas industry after consultation with industry representatives, not less than three of whom shall be currently engaged in the active operation of natural gas pipelines; and

(3) Six members shall be selected from the general public.

Report of pro-
posed standards.

(b) The Secretary shall submit to the Committee all proposed standards and amendments to such standards and afford such Committee a reasonable opportunity, not to exceed ninety days, unless extended by the Secretary, to prepare a report on the technical feasibility, reasonableness, and practicability of each such proposal. Each report by the Committee, including any minority views, shall be published by the Secretary and form a part of the proceedings for the promulgation of standards. In the event that the Secretary rejects the conclusions of the majority of the Committee, he shall not be bound by such conclusions but shall publish his reasons for rejection thereof. The Committee may propose safety standards for pipeline facilities and the transportation of gas to the Secretary for his consideration. All proceedings of the Committee shall be recorded and the record of each such proceeding shall be available for public inspection.

Publication.

Committee pro-
ceedings, avail-
ability to public.

(c) Members of the Committee other than Federal employees may be compensated at a rate to be fixed by the Secretary not to exceed \$100 per diem (including travel time) when engaged in the actual duties of the Committee. All members, while away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently. Payments under this section shall not render members of the Committee employees or officials of the United States for any purpose.

80 Stat. 499.

STATE CERTIFICATIONS AND AGREEMENTS

SEC. 5. (a) Except for the fourth sentence of section 3(b), section 12(b), and except as otherwise provided in this section, the provisions of this Act shall not apply to pipeline facilities and the transportation of gas (not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act) within a State when the safety stand-

52 Stat. 821.
15 USC 717w.

ards and practices applicable to same are regulated by a State agency (including a municipality) which submits to the Secretary an annual certification that such State agency (1) has regulatory jurisdiction over the safety standards and practices of such pipeline facilities and transportation of gas; (2) has adopted each Federal safety standard applicable to such pipeline facilities and transportation of gas established under this Act as of the date of the certification; (3) is enforcing each such standard; and (4) has the authority to require record maintenance, reporting, and inspection substantially the same as are provided under section 12 and the filing for approval of plans of inspection and maintenance described in section 11; and that the law of the State makes provision for the enforcement of the safety standards of such State agency by way of injunctive and monetary sanctions substantially the same as are provided under sections 9 and 10; except that a State agency may file a certification under this subsection without regard to the requirement of injunctive and monetary sanctions under State law for a period not to exceed two years after the date of enactment of this Act. Each annual certification shall include a report, in such form as the Secretary may by regulation provide, showing (i) name and address of each person subject to the safety jurisdiction of the State agency; (ii) all accidents or incidents reported during the preceding twelve months by each such person involving personal injury requiring hospitalization, fatality, or property damage exceeding \$1,000, together with a summary of the State agency's investigation as to the cause and circumstances surrounding such accident or incident; (iii) the record maintenance, reporting, and inspection practiced by the State agency to enforce compliance with such Federal safety standards, including a detail of the number of inspections made of pipeline facilities by the State agency during the preceding twelve months; and (iv) such other information as the Secretary may require. The report included with the first annual certification need not show information unavailable at that time. If after receipt of annual certification, the Secretary determines that the State agency is not satisfactorily enforcing compliance with Federal safety standards, he may, on reasonable notice and after opportunity for hearing, reject the certification or take such other action as he deems appropriate to achieve adequate enforcement including the assertion of Federal jurisdiction. When such notice is given by the Secretary, the burden of proof shall be upon the State agency to show that it is satisfactorily enforcing compliance with Federal safety standards.

Report, contents.

(b) With respect to any pipeline facilities and transportation of gas (not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act) for which the Secretary does not receive an annual certification under subsection (a) of this section, the Secretary is authorized by agreement with a State agency (including a municipality) to authorize such agency to assume responsibility for, and carry out on behalf of the Secretary as it relates to pipeline facilities and the transportation of gas not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act the necessary actions to—

52 Stat. 821.
15 USC 717w.

- (1) establish an adequate program for record maintenance, reporting, and inspection designed to assist compliance with Federal safety standards;
- (2) establish procedures for approval of plans of inspection and maintenance substantially the same as are required under section 11;
- (3) implement a compliance program acceptable to the Secretary including provision for inspection of pipeline facilities used in such transportation of gas; and

Violations,
notification to
Secretary.

(4) cooperate fully in a system of Federal monitoring of such compliance program and reporting under regulations prescribed by the Secretary.

Any agreement executed pursuant to this subsection shall require the State agency promptly to notify the Secretary of any violation or probable violation of a Federal safety standard which it discovers as a result of its program.

(c) (1) Upon an application submitted not later than September 30 in any calendar year, the Secretary is authorized to pay out of funds appropriated pursuant to section 15 up to 50 per centum of the cost of the personnel, equipment, and activities of a State agency reasonably required to carry out a safety program under a certification under subsection (a) or an agreement under subsection (b) of this section during the following calendar year. No such payment may be made unless the State agency making application under this subsection gives assurances satisfactory to the Secretary that the State agency will provide the remaining cost of such a safety program and that the aggregate expenditures of funds of the State, exclusive of Federal grants, for gas safety programs will be maintained at a level which does not fall below the average level of such expenditures for the last two fiscal years preceding the date of enactment of this section.

(2) Payments under this section may be made in installments, in advance or by way of reimbursement, with necessary adjustments on account of overpayments and underpayments.

(3) The Secretary may, by regulation, provide for the form and manner of filing of applications under this section, and for such reporting and fiscal procedures as he deems necessary to assure the proper accounting for Federal funds.

(d) A certification which is in effect under subsection (a) of this section shall not apply with respect to any new or amended Federal safety standard for pipeline facilities or the transportation of gas, not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act, established pursuant to this Act after the date of such certification. The provisions of this Act shall apply to any such new or amended Federal safety standard until the State agency has adopted such standard and has submitted an appropriate certification in accordance with the provisions of subsection (a) of this section.

(e) Any agreement under this section may be terminated by the Secretary if, after notice and opportunity for a hearing, he finds that the State agency has failed to comply with any provision of such agreement. Such finding and termination shall be published in the Federal Register, and shall become effective no sooner than fifteen days after the date of publication.

52 Stat. 821.
15 USC 717w.

Publication in
Federal Register.

JUDICIAL REVIEW OF ORDERS

SEC. 6. (a) Any person who is or will be adversely affected or aggrieved by any order issued under this Act may at any time prior to the sixtieth day after such order is issued file a petition for a judicial review with the United States Court of Appeals for the District of Columbia or for the circuit wherein such petitioner is located or has his principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose.

(b) Upon the filing of the petition referred to in subsection (a), the court shall have jurisdiction to review the order in accordance with chapter 7 of title 5 of the United States Code and to grant appropriate relief as provided in such chapter.

(c) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to

80 Stat. 392.
5 USC 701-706.

review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States Code.

(d) Any action instituted under this section shall survive, notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(e) The remedies provided for in this section shall be in addition to and not in substitution for any other remedies provided by law.

62 Stat. 928-

COOPERATION WITH FEDERAL POWER COMMISSION AND STATE COMMISSIONS

Sec. 7. Whenever the establishment of a standard or action upon application for waiver under the provisions of this Act, would affect continuity of any gas services, the Secretary shall consult with and advise the Federal Power Commission or State commission having jurisdiction over the affected pipeline facility before establishing the standard or acting on the waiver application and shall defer the effective date until the Federal Power Commission or any such commission has had reasonable opportunity to grant the authorizations it deems necessary. In any proceedings under section 7 of the Natural Gas Act (15 U.S.C. 717f) for authority to establish, construct, operate, or extend a gas pipeline which is or will be subject to Federal or other applicable safety standards, any applicant shall certify that it will design, install, inspect, test, construct, operate, replace, and maintain the pipeline facilities in accordance with Federal and other applicable safety standards and plans for maintenance and inspection. Such certification shall be binding and conclusive upon the Commission unless the relevant enforcement agency has timely advised the Commission in writing that the applicant has violated safety standards established pursuant to this Act.

52 Stat. 824;
56 Stat. 83;
61 Stat. 459.

COMPLIANCE

Sec. 8. (a) Each person who engages in the transportation of gas or who owns or operates pipeline facilities shall—

(1) at all times after the date any applicable safety standard established under this Act takes effect comply with the requirements of such standard; and

(2) file and comply with a plan of inspection and maintenance required by section 11; and

(3) permit access to or copying of records, and make reports or provide information, and permit entry or inspection, as required under section 12.

(b) Nothing in this Act shall affect the common law or statutory tort liability of any person.

CIVIL PENALTY

Sec. 9. (a) Any person who violates any provision of section 8(a), or any regulation issued under this Act, shall be subject to a civil penalty of not to exceed \$1,000 for each such violation for each day that such violation persists, except that the maximum civil penalty shall not exceed \$200,000 for any related series of violations: *Provided*, That for a reasonable period of time, not to exceed one year after the date of enactment of this Act, such civil penalties shall not be applicable to pipeline facilities existing on such date of enactment.

Exception.

(b) Any such civil penalty may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance,

after notification of a violation, shall be considered. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged or may be recovered in a civil action in the United States district courts.

INJUNCTION AND JURISDICTION

28 USC app.

Sec. 10. (a) The United States district courts shall have jurisdiction, subject to the provisions of rule 65 (a) and (b) of the Federal Rules of Civil Procedure, to restrain violations of this Act (including the restraint of transportation of gas or the operation of a pipeline facility) or to enforce standards established hereunder upon petition by the appropriate United States attorney or the Attorney General on behalf of the United States. Whenever practicable, the Secretary shall give notice to any person against whom an action for injunctive relief is contemplated and afford him an opportunity to present his views, and, except in the case of a knowing and willful violation, shall afford him reasonable opportunity to achieve compliance. However, the failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief.

18 USC app.

(b) In any proceeding for criminal contempt for violation of an injunction or restraining order issued under this section, which violation also constitutes a violation of this Act, trial shall be by the court or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of rule 42(b) of the Federal Rules of Criminal Procedure.

(c) Actions under subsection (a) of this section and section 9 may be brought in the district wherein any act or transaction constituting the violation occurred, or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

(d) In any action brought under subsection (a) of this section and section 9, subpoenas for witnesses who are required to attend a United States district court may run into any other district.

INSPECTION AND MAINTENANCE PLANS

Plans, filing
with State agency.

52 Stat. 821.
15 USC 717w.

SEC. 11. Each person who engages in the transportation of gas or who owns or operates pipeline facilities not subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act shall file with the Secretary or, where a certification or an agreement pursuant to section 5 is in effect, with the State agency, a plan for inspection and maintenance of each such pipeline facility owned or operated by such person, and any changes in such plan, in accordance with regulations prescribed by the Secretary or appropriate State agency. The Secretary may, by regulation, also require persons who engage in the transportation of gas or who own or operate pipeline facilities subject to the provisions of this Act to file such plans for approval. If at any time the agency with responsibility for enforcement of compliance with the standards established under this Act finds that such plan is inadequate to achieve safe operation, such agency shall, after notice and opportunity for a hearing, require such plan to be revised. The plan required by the agency shall be practicable and designed to meet the need for pipeline safety. In determining the adequacy of any such plan, such agency shall consider—

Consideration
factors.

(1) relevant available pipeline safety data;

- (2) whether the plan is appropriate for the particular type of pipeline transportation;
- (3) the reasonableness of the plan; and
- (4) the extent to which such plan will contribute to public safety.

RECORDS, REPORTS, AND INSPECTION FOR COMPLIANCE

SEC. 12. (a) Each person who engages in the transportation of gas or who owns or operates pipeline facilities shall establish and maintain such records, make such reports, and provide such information as the Secretary may reasonably require to enable him to determine whether such person has acted or is acting in compliance with this Act and the standards established under this Act. Each such person shall, upon request of an officer, employee, or agent authorized by the Secretary, permit such officer, employee, or agent to inspect books, papers, records, and documents relevant to determining whether such person has acted or is acting in compliance with this Act and the standards established pursuant to this Act.

(b) The Secretary is authorized to conduct such monitoring of State enforcement practices and such other inspection and investigation as may be necessary to aid in the enforcement of the provisions of this Act and the standards established pursuant to this Act. He shall furnish the Attorney General any information obtained indicating noncompliance with such standards for appropriate action. For purposes of enforcement of this Act, officers, employees, or agents authorized by the Secretary, upon presenting appropriate credentials to the individual in charge, are authorized (1) to enter upon, at reasonable times, pipeline facilities, and (2) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such facilities. Each such inspection shall be commenced and completed with reasonable promptness.

Monitoring of
State enforcement
practices.

(c) Accident reports made by any officer, employee, or agent of the Department of Transportation shall be available for use in any civil, criminal, or other judicial proceeding arising out of such accident. Any such officer, employee, or agent may be required to testify in such proceedings as to the facts developed in such investigations. Any such report shall be made available to the public in a manner which need not identify individuals. All reports on research projects, demonstration projects, and other related activities shall be public information.

Accident re-
ports.
Availability in
judicial proceed-
ings.

(d) All information reported to or otherwise obtained by the Secretary or his representative pursuant to subsection (a), (b), or (c) which information contains or relates to a trade secret referred to in section 1905 of title 18 of the United States Code shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. Nothing in this section shall authorize the withholding of information by the Secretary or any officer, employee, or agent under his control, from the duly authorized committees of the Congress.

62 Stat. 791.

ADMINISTRATION

SEC. 13. (a) The Secretary shall conduct research, testing, development, and training necessary to carry out the provisions of this Act. The Secretary is authorized to carry out the provisions of this section by contract, or by grants to individuals, States, and nonprofit institutions.

Research and
development.
Contracts, etc.

(b) Upon request, the Secretary shall furnish to the Federal Power Commission any information he has concerning the safety of any

Safety of mate-
rials, etc.

materials, operations, devices, or processes relating to the transportation of gas or the operation of pipeline facilities.

Cooperation
with other agen-
cies.

(c) The Secretary is authorized to advise, assist, and cooperate with other Federal departments and agencies and State and other interested public and private agencies and persons, in the planning and development of (1) Federal safety standards, and (2) methods for inspecting and testing to determine compliance with Federal safety standards.

ANNUAL REPORT

Report to Presi-
dent and Con-
gress.

SEC. 14. (a) The Secretary shall prepare and submit to the President for transmittal to the Congress on March 17 of each year a comprehensive report on the administration of this Act for the preceding calendar year. Such report shall include—

Contents.

(1) a thorough compilation of the accidents and casualties occurring in such year with a statement of cause whenever investigated and determined by the National Transportation Safety Board;

(2) a list of Federal gas pipeline safety standards established or in effect in such year with identification of standards newly established during such year;

(3) a summary of the reasons for each waiver granted under section 3(e) during such year;

(4) an evaluation of the degree of observance of applicable safety standards for the transportation of gas and pipeline facilities including a list of enforcement actions, and compromises of alleged violations by location and company name;

(5) a summary of outstanding problems confronting the administration of this Act in order of priority;

(6) an analysis and evaluation of research activities, including the policy implications thereof, completed as a result of Government and private sponsorship and technological progress for safety achieved during such year;

(7) a list, with a brief statement of the issues, of completed or pending judicial actions under the Act;

(8) the extent to which technical information was disseminated to the scientific community and consumer-oriented information was made available to the public;

(9) a compilation of—

(A) certifications filed by State agencies (including municipalities) under section 5(a) which were in effect during the preceding calendar year, and

(B) certifications filed under section 5(a) which were rejected by the Secretary during the preceding calendar year, together with a summary of the reasons for each such rejection; and

(10) a compilation of—

(A) agreements entered into with State agencies (including municipalities) under section 5(b) which were in effect during the preceding calendar year, and

(B) agreements entered into under section 5(b) which were terminated by the Secretary during the preceding calendar year, together with a summary of the reasons for each such termination.

Legislative
recommendations.

(b) The report required by subsection (a) shall contain such recommendations for additional legislation as the Secretary deems necessary to promote cooperation among the several States in the improvement of gas pipeline safety and to strengthen the national gas pipeline safety program.

APPROPRIATIONS AUTHORIZED

SEC. 15. For the purpose of carrying out the provisions of this Act over a period of three fiscal years, beginning with the fiscal year ending June 30, 1969, there is authorized to be appropriated not to exceed \$500,000 for the fiscal year ending June 30, 1969; not to exceed \$2,000,000 for the fiscal year ending June 30, 1970; and not to exceed \$4,000,000 for the fiscal year ending June 30, 1971.

Approved August 12, 1968.

Public Law 90-482

AN ACT

To amend the Act of August 27, 1954, relative to the unlawful seizure of fishing vessels of the United States by foreign countries.

August 12, 1968
[S. 2269]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of August 27, 1954 (68 Stat. 883; 22 U.S.C. 1971-1976), is amended by adding at the end thereof a new section to read as follows:

Fishermen's
Protective Act of
1967, amendment.

"SEC. 7. (a) The Secretary, upon receipt of an application filed with him at any time after the effective date of this section by the owner of any vessel of the United States which is documented or certificated as a commercial fishing vessel, shall enter into an agreement with such owner subject to the provisions of this section and such other terms and conditions as the Secretary deems appropriate. Such agreement shall provide that, if said vessel is seized by a foreign country and detained under the conditions of section 2 of this Act, the Secretary shall guarantee—

22 USC 1972.

"(1) the owner of such vessel for all actual costs, except those covered by section 3 of this Act, incurred by the owner during the seizure and detention period and as a direct result thereof, as determined by the Secretary, resulting (A) from any damage to, or destruction of, such vessel, or its fishing gear or other equipment, (B) from the loss or confiscation of such vessel, gear, or equipment, or (C) from dockage fees or utilities;

22 USC 1973.

"(2) the owner of such vessel and its crew for the market value of fish caught before seizure of such vessel and confiscated or spoiled during the period of detention; and

"(3) the owner of such vessel and its crew for not to exceed 50 per centum of the gross income lost as a direct result of such seizure and detention, as determined by the Secretary of the Interior, based on the value of the average catch per day's fishing during the three most recent calendar years immediately preceding such seizure and detention of the vessel seized, or, if such experience is not available, then of all commercial fishing vessels of the United States engaged in the same fishery as that of the type and size of the seized vessel.

"(b) Payments made by the Secretary under paragraphs (2) and (3) of subsection (a) of this section shall be distributed by the Secretary in accordance with the usual practices and procedures of the particular segment of the United States commercial fishing industry to which the seized vessel belongs relative to the sale of fish caught and the distribution of the proceeds of such sale.

Attachment 2

§ 28-692.03. Admissibility of breath test; promulgation of rules for tests; permits

A. The results of a breath test administered for the purpose of determining a person's blood alcohol level are admissible as evidence in any trial, action or proceeding for a violation of § 28-692 upon establishing the following foundational requirements:

1. The test was performed using a quantitative breath testing device approved by the department of health services. A properly authenticated certification by the department of health services is sufficient to establish this requirement.

2. The operator who conducted the test possessed a valid permit issued by the department of health services to operate the device used to conduct the test.

3. An operator observed the person charged with the violation for twenty minutes immediately preceding the administration of the test.

4. The operator who conducted the test followed an operational checklist approved by the department of health services for the operation of the device used to conduct the test. The testimony of the operator is sufficient to establish this requirement.

5. The device used to conduct the test was in proper operating condition. Records of periodic maintenance which show that the device was in proper operating condition at a time before and after the test are admissible in any proceeding as prima facie evidence that the device was in proper operating condition at the time of the test. Such records are public records.

B. Compliance with subsection A of this section is the only requirement for the admission in evidence of the breath test result.

C. The director of the department of health services shall promulgate rules prescribing methods and procedures for the administration of tests of blood, breath, urine or other bodily substance to determine blood alcohol content. These rules shall include:

1. The approval of analytical methods and standards for quantitative breath testing devices which accurately measure blood alcohol levels.

2. Procedures for ensuring the accuracy of results obtained from approved breath testing devices.

3. Qualifications for persons who conduct breath tests or analyses.

4. Qualifications for persons who instruct others in the operation of breath testing devices.

D. The director of the department of health services shall issue permits to operators or analysts who have received approved instruction and have demonstrated their ability to accurately operate an approved breath testing device or accurately analyze blood, breath, urine or other bodily substance for alcohol content. The director of the department of health services may revoke the permit of a person who is not operating a breath testing device or analyzing blood, breath, urine or other bodily substance according to the rules established by the director.

Added by Laws 1982, Ch. 234, § 10. Amended by Laws 1983, Ch. 279, § 8; Laws 1984, Ch. 257, § 6, eff. April 24, 1984.